RECORD
AND
BRIEFS

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No. 15-577

In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA INC.,

PETITIONER,

V.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER URGING THAT A WRIT OF CERTIORARI BE GRANTED

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QUESTION PRESENTED

Whether exclusion of a church-related school from a secular program providing scrap tire for playgrounds violates the First and Fourteenth Amendments to the United States Constitution.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God as the moral foundation of our laws, promoting a return to the historic and original interpretation of the United States Constitution, educating citizens and government officials about the Constitution and the Godly foundation of this country's laws and justice system, and defending the free exercise of religion.

The Foundation has an interest in this case because it believes that the State of Missouri is directly discriminating against a church in violation of the Free Exercise Clause of the First Amendment to the United States Constitution. The Framers of our constitutional system of government rightly

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[1] Pursuant to this Court's rule 37.3, all parties have consented to the filing of this *amicus* brief. Further, pursuant to Rule 37.6, this *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

understood that Church and State are separate entities, each of which has a distinct role in God's economy as well as in our best interest. But these separate entities complement each other; they should not be at odds with one another. By preserving law and order, the State makes it easier for the Church to proclaim religious truth; by teaching religious values and inculcating virtue and good moral character, the Church makes it easier for the State to preserve law and order. When the State singles out churches for discrimination by prohibiting churches from receiving a benefit or participating in a program that is open to other nonprofits, it adopts a stance that is neither benevolent neutrality nor strict neutrality but rather a stance of active and overt hostility toward religion. Such hostility would have been anathema to the Framers of our constitutional system and should be anathema to this Court as well.

SUMMARY OF ARGUMENT

The Framers of our Constitution intended Church and State to be distinct institutions. But did they intend that the State should discriminate against the Church? Did they intend that church schools must compete at a disadvantage with secular schools, even in purely secular aspects like providing safe playgrounds?

Petitioner believes the Framers had no such intention, and *Amicus* agrees.

There is no question that Petitioner Trinity Lutheran Church and its affiliated Learning Center were fully qualified for Missouri's Scrap Tire Program. The State DNR evaluated Trinity and rated it fifth among the applicants for fourteen grants. But then the State DNR wrote to Trinity saying Trinity could not be considered for the Program because Article I Section 7 of the Missouri Constitution prohibits aid to churches.

Article I Section 7 is what is known as a "mini-Blaine amendment." After the narrow defeat in 1875 of Senator James G. Blaine's proposed amendment to the United States Constitition prohibiting aid to churches, numerous states including Missouri adopted similar amendments to their state constitutions. The historical evidence establishes that the Blaine Amendment and at least many of the state mini-Blaine amendments were motivated by strong anti-Catholic sentiment. At the time, immigration to the United States from Roman

Catholic countries was increasing. Many Catholics objected to what appeared to be Protestant content in the American public schools, and they began to establish widespread Catholic schools, and they sought support for their schools because they were paying taxes to support public schools to which they could not send their children. Protestants and other non-Catholics supported the mini-Blaine amendments to stifle Catholic schools and ensure that Catholic schools received no government support.

In the recent cases of *Windsor v. United States,* 570 U.S. ___ (2013), and *Obergefell v. Hodges,* ___ U.S. ___ (2015), this Court held that laws prohibiting same-sex marriage must be invalidated because they were based in part on animus toward homosexuals. Similarly, a state provision forbidding aid to parochial schools must be invalidated if animus toward Roman Catholics is a "substantial" or "motivating" factor in its enactment.

The Eighth Circuit erroneously ruled that the denial of scrap tire funds did not violate Trinity's right to free exercise of religion, and the 8th Circuit therefore evaluated the case using a "rational basis" test. But Trinity was rejected for the program solely because Trinity is a church and Article I Section 7 supposedly forbids their participation. Because Trinity was required to either (1) compromise its religious belief that the Learning Center must be a part of its ministry or (2) forego a substantial state benefit that is available to the general public, this "Hobson's choice" constitutes a free exercise violation. Because Article I Section 7 is clearly aimed at

religion, and because Trinity has asserted a "hybrid" claim of a free exercise, establishment, free speech, and equal protection violation, this case should be evaluated on an strict scrutiny compelling interest / less restrictive means basis.

Article I Section 7 has two clauses; the first prohibits aid to churches, and the second prohibits preference for or discrimination against churches. If the two clauses are interpreted together, a program that aids only the secular aspects of a school and treats the Learning Center on the same basis with all other schools does not violate Article I Section 7. Because this is a reasonable interpretation of Section 7, this Court has a "duty to save" the provision by interpreting it as applied to allow Trinity's participation in the Scrap Tire Program, thereby eliminating or avoiding a constitutional challenge.

In a series of cases, this Court has ruled that religious organizations are entitled to equal treatment with other organizations in the public arena. However, many state and local officials, and some courts as well, apparently don't "get it," because such discrimination continues today. This case presents an excellent opportunity for this Court to send a clear message: The State must not discriminate against the Church.

ARGUMENT

I. THIS IS AN APPROPRIATE CASE FOR THE COURT TO CONSIDER.

The Petitioner, Trinity Lutheran Church, has effectively demonstrated that this case is ripe for this Court's adjudication. The lower courts are split on the proper interpretation of this Court's ruling in *Locke v. Davey,* 540 U.S. 712 (2004); the Seventh Circuit and the Tenth Circuit have given the case a narrow interpretation while the First Circuit and now the Eighth Circuits, as well as the Colorado Supreme Court, have given the case a broad interpretation. And as Trinity has observed, this is a clean case in which the facts are clear and the issue is squarely presented.

Furthermore, the underlying issue comes up in innumerable ways all across the nation: May the State discriminate against the Church? May the State bus children to public and private schools but refuse to bus children to parochial schools? May state agencies refuse to rent their facilities to churches? May cities use zoning ordinances to prohibit churches in certain areas? May the State prohibit church services in federally-funded nursing homes? If there is "play in the joints" between that which the Establishment Clause forbids and that which the Free Exercise Clause requires, how is that "play" to be worked out in practice? State agencies, county commissions, city councils, school boards, and other governmental entities are besieged with questions about the proper place of the Church in the public arena, and they are looking to this Court for answers.

In many cases the Court has addressed the general issue of equal protection for religious entities, but it seems the message has not sunk in, because confusion still reigns. In *Widmar v. Vincent,* 454 U.S. 263 (1981), this Court held that state universities could not prohibit religious clubs from meeting on campus while other groups are allowed to meet. In *Westside School District v. Mergens*, 496 U.S. 226 (1990), this Court applied the same principle to public high schools. In *Rosenberger v. Rector & Visitors of University of Virginia,* 515 U.S. 819 (1995), this Court held that a state university cannot refuse to fund religious publications while funding other publications. And in *Lamb's Chapel v. Center Moriches Union free School District,* 508 U.S. 384 (1993), this Court held that a public school may not refuse to rent its facilities to a church while renting it to other organizations.

And yet, the issue keeps coming back. Many officials of local and state governmental entities seem to believe the Establishment Clause requires them to discriminate against churches, religious organizations, and religious people. This is the right time and the right case for this Court to settle the issue clearly, answering the question whether the State may discriminate against the Church, and if so, under what circumstances and with what limits it may do so.

II. THE EIGHTH CIRCUIT ERRED IN USING A RATIONAL BASIS TEST RATHER THAN A COMPELLING INTEREST/LESS RESTRICTIVE MEANS TEST TO EVALUATE PETITIONER'S HYBRID RELIGIOUS LIBERTY CLAIM

The Missouri DNR openly stated that its refusal to allow Trinity to participate in the Scrap Tire Grant Program was based on the fact that Trinity is a church. It is therefore inconceivable that the Eight Circuit would rule that Trinity does not have a valid free exercise claim that has been infringed by Missouri's refusal.

Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. 707 (1881), involved a Jehovah's Witness whose employment at a foundry was terminated because he refused on religious conviction to build tank turrets. The Review Board denied his application for unemployment compensation because it considered his refusal to be valid grounds for termination. But this Court ruled 8-1 in favor of Thomas, saying at 717-18,

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

In so doing, the Court cited approvingly *Sherbert v. Verner,* 374 US. 398 (1963), in which the Court ruled in favor of a Seventh-Day Adventist who was terminated from her employment because she refused based on religious convictions to work on Saturday. The Court held 7-2 at 410 that "South

Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting a day of rest."

That is precisely what the State of Missouri requires for its Scrap Tire Grant Program: the applicant must either (1) cease operating the Learning Center as a ministry of Trinity Lutheran School, or (2) give up a substantial state benefit available to the general public, the benefit of being able to use scrap tire to provide a better and safer playground for its students. This is precisely what this Court said South Carolina may not do in *Sherbert* and what this Court said Indiana may not do in *Thomas*. Doing so constitutes a violation of Trinity's religious freedom under the Free Exercise Clause of the First Amendment.

III. MISSOURI'S "MINI-BLAINE" AMENDMNT IS BASED ON ANIMUS AND IS THEREFORE UNCONSTITUTIONAL

The Missouri DNR's openly stated that its refusal to allow Trinity to participate in the Scrap Tire Grant Program was based on the fact that Trinity is a church. This clearly constitutes religious discrimination. The question is, is there any justification for this discrimination against religion?

It is undisputed that the Trinity was fully qualified for the Scrap Tire Grant Program in every respect except for being a church-related school. There is no suggestion that Trinity's participation in the Scrap Tire Grant Program would violate any prong of the *Lemon* test. It has at least two clear secular purposes (ensuring that Trinity's children (and neighborhood children who use the playground)

have a safe playground and providing an environmentally-friendly way of using scrap tires); the primary effect of the Program as a whole does not advance or inhibit religion; and there is no excessive entanglement with religion. It involves no coercion, and it does not constitute government endorsement of religion because the Program is available to secular as well as (at least until now) religious organizations.

It is undisputed that sole reason for the Missouri DNR's refusal to allow Trinity to participate in the Program was the Article I, Section 7 of the Missouri State Constitution which provides in part that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof...; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

Amicus believes Article I Section 7 is unconstitutional on its face, but because Petitioner has argued only that the provision is unconstitutional as applied, *Amicus* will limit itself to that position.

Clearly, a state constitutional provision cannot infringe a right guaranteed by the United States Constitution, without justification. As *Amicus* has demonstrated in Part II of this brief, in this case that justification has to be a compelling interest that cannot be achieved by less restrictive means. The only interest cited by the Missouri DNR, and the only state interest recognized by the District Court and the Eighth Circuit, is adherence to Article I, Section 7. That interest is invalid because Article I Section 7 is unconstitutional, both facially and as applied.

In *Windsor v.* 570 U.S. ___ (2013), this Court struck down the federal Defense of Marriage Act, in large part because the Court concluded that DOMA was based on animus toward same-sex couples. As the Court said, "DOMA seeks to injure the very class New York seeks to protect", that the "avowed purpose and practical effect of the law...are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages....," and that "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal."

In *Obergefell v. Hodges,* ___ U.S. ___ (2015), this Court invalidated the marriage laws of Michigan, Ohio, Kentucky, and Tennessee, in part because laws prohibiting same-sex marriage reflected an animus toward same-sex couples. The opinion noted that

> Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment,

> barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.
>
> For much of the 20th century, moreover, homosexuality was treated as an illness. ...

Just as laws prohibiting same-sex marriage were held to be invalid because they were based on animus toward homosexuals, so a state law forbidding aid to churches must be struck down if it is based upon animus toward religion, or toward a particular religion.

In fact, the evidence that Missouri's Article I Sec. 7 was based on animus toward Roman Catholics is just as strong as or stronger tan the evidence that same-sex marriage laws were based on animus toward homosexuals.

In *Mitchell v. Helms,* 530 U.S. 793 (2000), the plurality opinion of Justice Thomas, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy, declared at 828 that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." They continued at 828,

> Opposition to aid to "sectarian" schools acquired prominence in the 1870s with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to

> Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." See *generally* Green, *The Blaine Amendment Reconsidered*, 36 AM. J. Legal Hist. 38 (1992).

The plurality concluded at 829 that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs [represented] a doctrine, born of bigotry, that should be buried now."

Likewise, in *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), three dissenting Justices (Breyer, J., joined by Stevens and Souter, JJ.) -- all different from the Justices who wrote the plurality opinion in *Mitchell* -- described the Protestant domination of public education in the early 1800s, the rising Catholic resistance to that Protestant domination, and the anti-Catholic sentiment that rose among Protestants as they saw "their" school system being threatened, and the Catholic response of establishing a system of Catholic schools. The three Justices wrote at 721,

> Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the "Protestant position" on this matter, scholars report, "was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic.)" And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend

> the United States Constitution (unsuccessfully) to make certain that government would not help pay for "sectarian" (i.e., Catholic) schooling for children. (citations omitted).

Animus need not be the sole, or even the primary, purpose of a statute for its application to constitute an Equal Protection Clause violation. It need only be a "'substantial' or 'motivating' factor behind enactment of the law." See *Hunter v. Underwood,* 471 U.S. 222, 228 (1985); *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 287 (1977). The evidence clearly establishes that animus toward Roman Catholics was a "substantial" or "motivating" factor behind the national Blaine amendment and the various state mini-Blaine amendments. Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice,* 59 N.Y.U. SURV. AM. L:. 413,434 (2003), concludes that the state interest enshrined in the Blain Amendments is not compelling; it is not an extension of the Establishment Clause but rather "historical discrimination against a religious minority." See also, Brandi Richardson, Comment: *Eradicating Blaine's Legacy of Hate: Removing the Barrier to State Funding of Religious Education,* 52 CATH. U.L.REV. 1041, 1071-72 (2003). And Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism,*1 5 YALE L. & POL'Y REV. 113, 146 (1996) cites The Nation, which was sympathetic to the Blaine Amendment, as acknowledging:

> Mr. Blaine did, indeed bring forward... a [United States] Constitutional amendment

> directed against the Catholics, but the anti-Catholic excitement was, as every one knows now, a mere flurry; and all that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes.).

Although possibly not as intense as in other states, anti-Catholic bigotry existed in Missouri. H. Margaret Stauf, in her unpublished master's thesis titled *The Anti-Catholic Movement in Missouri: Post Civil War Period* (1936); on file with St. Louis University Pius Library), found that there were several periods of strong anti-Catholic sentiment in Missouri. One of these was during the period immediately following the War Between the States, caused by the Catholic Church's decision to remain neutral and refuse to denounce the Confederacy and may have resulted in the 1865 constitutional provision forbidding preference to be given by law to any church, sect or mode of worship. Although this anti-Catholic sentiment had waned somewhat by 1875 (the year Missouri's mini-Blaine amendment was adopted), it was still a factor.

For an excellent discussion of the narrowly-defeated federal Blaine Amendment and the various state mini-Blaine amendments, see Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047 (1995-1996); and see Aaron E. Schwartz, *Dusting off the Blaine Amendment: Two Challenges to Missouri's Anti-Establishment Tradition*, Missouri Law Review, Vol. 73, Iss. 1 (2008).

IV. THE COURTS HAVE A "DUTY TO SAVE" A CONSTITUTIONALLY INFIRM STATUTE OR STATE CONSTITUTIONAL PROVISION BY ADOPTING A CONSTRUCTION BY WHICH THE PROVISION IS CONSTITUTIONAL.

In *National Labor Relations Board v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979), this Court considered the refusal of the Catholic Bishop to recognize or bargain with unions claiming to represent lay teachers in the Catholic schools of the Diocese. The Church argued that (1) the National Labor Relations Act did not give the NLRB jurisdiction over parochial schools, and (2) if the Act did give the NLRB jurisdiction, the Act violated the Establishment and Free Exercise Clauses of the First Amendment.

The Court noted that if the Act gave the NLRB jurisdiction over parochial schools, there would arise a serious question about the Act's constitutionality; but if the Act did not give the NLRB jurisdiction over parochial schools, the constitutional issue would be resolved or at least avoided. Because both were reasonable interpretations of the Act, the Court concluded at 507:

> Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.

Like the National Labor Relations Act as interpreted by this Court in *NLRB v. Catholic Bishop of Chicago,* Article I Section 7 of the Missouri Constitution is capable of at least two reasonable interpretations, as Petitioner has argued and as *Amicus* will demonstrate in VI below. If the "no aid" provision of Clause I of the Article is interpreted standing alone to prohibit Trinity's participation in the Scrap Tire Program, it violates the Equal Protection Clause of the Fourteenth Amendment and the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment. But if the "no aid" provision of Clause I is interpreted in harmony with the "no discrimination" provision of Clause II, the constitutional issue is resolved or avoided. Because both are arguably reasonable interpretations, this Court has a "duty to save" the provision by interpreting both clauses in harmony with one another and holding that, as applied, Article I Section 7 does not prohibit Trinity's participation in the Scrap Tire Program.

I. THE CLAUSES OF ARTICLE I SECTION 7 INTERPRETED IN HARMONY TOGETHER, PERMIT TRINITY'S PARTICIPATION IN THE SCRAP TIRE PROGRAM

As Petitioner has demonstrated, Article I Section 7 contains two clauses. Clause 1 provides "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such...." Clause 2 provides "that no preference shall be given to nor any discrimination made against any

church, sect or creed of religion, or any form of religious faith or worship."

If the two clauses are interpreted together, the proper interpretation would be that the State may not give churches an unfair advantage or preference over other churches or, perhaps, over other institutions. But a provision to aid the secular aspects of education by providing safe playgrounds for children would not be "in the aid of any church, sect or denomination." Furthermore, to deny that aid to Trinity's Learning Center solely because it is owned and operated by Trinity Lutheran Church would constitute "discrimination made against any church, sect or creed of religion." Putting the two clauses together, allowing Trinity to participate in the Scrap Tire Program on an equal basis with other schools does not give "preference" to Trinity over other schools and does not discriminate against Trinity.

Because this is a reasonable interpretation of Article I Section 7, and because this interpretation would "save" the provision by eliminating or avoiding potential conflict with the United States Constitution, this Court should follow this interpretation.

CONCLUSION

This is a "clean" case in which the issues are clearly presented. The lower courts are split on whether and to what extent a state may discriminate against a church or religious organization by categorically excluding them from state programs. The requisites for a grant of certiorari are clearly present in this case.

Furthermore, this is a clear opportunity for the Court to send a clear message. In *Widmar*, *Mergens*, *Rosenberger*, *Lamb's Chapel*, and other cases, the Court appears to have sent a message that state and local governments must at least give equal treatment to churches and religious organizations and may not discriminate against them or exclude them solely because they are religious. However, many officials and even courts at the state and local levels of government seem to have missed that message or tried to work around it. This is a good case in which this Court can clarify once and for all: The State may not discriminate against the Church.

Respectfully submitted, this the 7th day of December, 2015.

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